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No. 621

# In The Supreme Court of The United States

OCTOBER TERM, 1965

T. KIMBALL HILL,

Petitioner,

vs.

UNITED STATES OF AMERICA,
TREASURY DEPARTMENT,
INTERNAL REVENUE SERVICE,
DISTRICT DIRECTOR OF INTERNAL REVENUE,
INTELLIGENCE DIVISION,
SAN DIEGO COUNTY OFFICE,
LLOYD TUCKER, CHIEF INTELLIGENCE DIVISION,
CORWIN B. DeVOTIE, and EDWIN H. WORDELL,

Respondents.

## PETITION FOR REHEARING ON ORDER DENYING WRIT OF CERTIORARI

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## SUBJECT INDEX


| | | Page |
|---|---|---|
| ISSUES | | 2 |
| I | Whether a District Court's denial of a motion to suppress and return records and other data is a final, appealable judgment when the motion has been made, argued and ruled upon prior to, and in the absence of criminal proceedings being instituted against the petitioner | 2 |
| II | Whether the obtaining of information, including records, from an individual taxpayer by Internal Revenue Agents constitutes a deprivation of the taxpayer's rights under the Fourth, Fifth and Sixth Amendments to the United States Constitution when at no time prior to obtaining such records and information was the taxpayer advised of his constitutional rights or notified that the investigation had changed in nature from civil to criminal | 6 |
| CONCLUSION | | 11 |

## TABLE OF AUTHORITIES CITED


Page

### CASES

DiBella v. United States,
369 U. S. 121 (1962) . . . . . 2, 3

Escobedo v. Illinois,
378 U. S. 478 (1964) . . . . . 2, 6, 7
10, 11

Gottone v. United States,
345 F.2d 165 (10th Cir. 1965)
Cert. denied 34 U.S.L.W. 3158 . . . . . 4, 5

Kohatsu v. United States,
65-2 U.S.T.C. ¶9715 (9th Cir. 1965) . . 7, 8
9, 10

Russo v. New Jersey,
351 F.2d 429 (3rd Cir. 1965) . . . . . 9

United States v. Gower,
65-2 U.S.T.C. ¶ 15,655
(M.D. Pa. 1965) . . . . . 8, 9, 10

United States v. Schoenburg, U.S.
Dist. Court Phoenix No. C-16922 . . . . 7

### CONSTITUTION

Constitution of the United States
Fourth Amendment . . . . . 6
Fifth Amendment . . . . . 6
Sixth Amendment . . . . . 6

## TABLE OF AUTHORITIES CITED (Cont'd.)


| | Page |
|---|---|
| **RULES** | |
| Federal Rule of Criminal Procedure 41(e) . . | 5, 8 |
| Supreme Court Revised Rule 58 (2) . . . . . | 2 |

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On December 13, 1965, this Court entered its order denying petitioner's application for a writ of certiorari to the United States Court of Appeals for the

Ninth Circuit. Petitioner, under the terms of Supreme Court Revised Rule 58 (2), herein moves that the Court reconsider its order of December 13 and grant the aforesaid petition for certiorari.

This petition for rehearing is grounded in the fact that certain recent cases have come to light which demonstrate clearly the existence of a conflict among the circuits on the issue of appealability as well as over the application of Escobedo v. Illinois, 378 U. S. 478 (1964) to the tax fraud area.

## ISSUES

### I

Whether a District Court's denial of a motion to suppress and return records and other data is a final, appealable judgment when the motion has been made, argued and ruled upon prior to, and in the absence of criminal proceedings being instituted against the petitioner.

It was pointed out in T. Kimball Hill's petition for writ of certiorari (p. 13) that there was little definitive authority on the applicability of DiBella v. United States, 369 U. S. 121 (1962) to the tax fraud investigation. It was also suggested that what available authorities there were, tended to be either inconclusive or inapplicable to the fraud situation. Consequently, it was petitioner's position that this, coupled with the great practical importance of the appealability problem in the day-to-day administration of the criminal law, warranted the granting of a writ of certiorari by this

Court. At that time, however, petitioner could not point to a direct conflict among the circuits on the appealability issue. Such a conflict does now exist.

It was, and is, fundamental to petitioner's argument that the basic holding of DiBella revolves around independence of the motion from a going criminal proceeding and that an element of suppression does not in and of itself negate appealability.

It was noted in the petition for writ of certiorari that it is not uncommon in the criminal tax field for the entire course of a prosecution--indeed often whether there will be a prosecution at all--to hinge on the legality and admissibility of oral and documentary evidence obtained from the taxpayer far in advance of trial; evidence obtained by conduct whose constitutionality can be finally adjudicated long before any conventional criminal process is invoked against the taxpayer. It is this almost unique independence from pending criminal matters which prompted the Ninth Circuit to hold below that:

> "Admittedly, this motion does not involve a dilatory tactic which interferes with the expeditious resolution of a pending criminal matter; and in that respect it is not objectionable to entertain this appeal." 346 F.2d 175, 178 (9th Cir. 1965)

Yet, notwithstanding this finding the Ninth Circuit went on to hold that:

> "As pointed out by appellees in their brief (p. 12), 'DiBella requires both

> a request for return of property and independence from the criminal case before the order denying return becomes appealable.'" Ibid.

Then, almost simultaneously with the rendering of the Ninth Circuit's decision in Hill, the United States Court of Appeals for the Tenth Circuit in the case of Gottone v. United States, 345 F.2d 165 (10th Cir. 1965), cert. denied 34 U.S.L.W. 3158, on facts similar to Hill, handed down a decision totally at odds to that of the Ninth Circuit. The Gottone case involved a seizure by Internal Revenue Agents of various papers and other documentary evidence from the home and automobile of the appellant. Substantively, the point at issue was whether the seizure was within the scope of the warrant held by the agents. The District Court held that it was and on appeal the Tenth Circuit affirmed.

The more significant holding, however, relates to the issue of appealability wherein the Tenth Circuit stated:

> "This is an independent proceeding filed by motion under Rule 41(e), Fed. R. Crim. P., wherein the appellant-movant sought to suppress and have returned to him certain papers and materials taken from his person, automobile and home by agents of the United States. Appellant is not under arrest nor is an information or indictment outstanding against him. Since the motion is not made in nor dependent upon

> a case in esse, the District Court's denial of such motion is an appealable order, Go-Bart Importing Co. v. United States, 282 U. S. 344, 356, 51 S. Ct. 153, 75 L. Ed. 374 and within the exception set forth in DiBella v. United States, 369 U. S. 121, 131-132, 82 S. Ct. 654, 7 L. Ed. 2d 614."

It should be noted that in Gottone, as in Hill, the initial motion to suppress and return was made under the terms of Federal Rule of Criminal Procedure 41 (e). In both cases suppression as well as return was sought and in each case the motion was made prior to the institution of any formal criminal process against the taxpayer. Yet, on these identical facts the Tenth Circuit held that the denial of the motion to suppress was independent and appealable while the Ninth Circuit ruled directly to the contrary, deeming the denial of relief to be nonappealable -- totally irreconcilable holdings.

In light of the diametrically opposed positions adopted by these two adjoining circuits, as well as the very practical consideration that the appealability or nonappealability of suppression orders is the pivot on which the entire course of innumerable tax fraud prosecutions rest, it is submitted that the Court should grant certiorari on this issue.

II

Whether the obtaining of information, including records, from an individual taxpayer by Internal Revenue Agents constitutes a deprivation of the taxpayer's rights under the Fourth, Fifth and Sixth Amendments to the United States Constitution when at no time prior to obtaining such records and information was the taxpayer advised of his constitutional rights or notified that the investigation had changed in nature from civil to criminal.

Just as recent decisions have pointed up a conflict among the circuits over the problem of appealability, so too, a disagreement among the courts appears to be rapidly developing on the matter of this Court's decision in Escobedo v. Illinois, 378 U. S. 478 (1964) as it applies to tax fraud prosecutions.

As was pointed out in the petition for writ of certiorari, the clearest kind of disagreement exists in both the federal and state courts on the question of whether the constitutional right to counsel requires that an accused be affirmatively warned of his rights as well as on the question of when precisely the "accusatory stage" is reached. At the time of filing the petition for certiorari, there were not, to petitioner's knowledge, any cases which had considered these problems in the context of a tax fraud prosecution.

Shortly thereafter, an unreported District Court decision was handed down by the United States District Court for the District of Arizona which did appear to consider the above problems although no formal opinion

was rendered by the court. This case, United States v. Schoenburg, U. S. Dist. Court, Phoenix No. C-16922 was brought to this Court's attention in petitioner's supplemental brief at pages 2-5.

Since that time, two additional decisions have come to light which, when contrasted, point to a wide diversity of opinion with respect to the meaning and applicability of Escobedo in the context of a tax fraud prosecution.

In the first, Kohatsu v. United States, 65-2 U.S. T.C. ¶9715 (9th Cir., 1965), the Ninth Circuit was confronted with a situation which on its facts bears a striking resemblance to the case at bar. In Kohatsu, as in the present case, the defendant was a taxpayer who had been subjected to a fraud investigation during the course of which he gave over books and records to the Special Agent. Likewise, the taxpayer made certain statements of an arguably incriminating nature at a formal interview conducted at Internal Revenue Service offices. A warning of constitutional rights was given at the time of the interview with no previous warnings having been tendered beyond the initial identification of the Special Agent by name and job title. On these facts, the Ninth Circuit held that Escobedo was not applicable to the tax fraud investigation since Escobedo involved the case of a definitely existing, though yet unsolved crime, whereas in the tax fraud situation the investigation was preliminary only and had not yet "focused" on the taxpayer as a criminal "accused."

Contrasted to this is the approach of the United

States District Court for the Middle District of Pennsylvania in United States v. Gower, 65-2 U.S.T.C. ¶ 15,655 (M.D. Pa. 1965). In Gower, as in both Hill and Kohatsu, a motion to suppress evidence of records turned over to the Special Agent and of an oral statement given at Internal Revenue Service offices was made by the petitioner under Rule 41 (e) of the Federal Rules of Criminal Procedure. In Gower, the suppression motion was made in conjunction with a motion for the production of documents. On hearing of the motions, it became apparent that there was a substantial conflict of evidence on the question of whether the taxpayer had been warned of his constitutional rights and if so, to what extent. In light of this the court ordered an in camera inspection of the subpoenaed materials to be followed later by an argument on the motion to suppress. The argument of the suppression motion was then set for hearing, continued once and then continued again for an indefinite period. As of this date the motion has not yet been finally determined. The case is important, however, because the court did hold that the accusatory stage might have been reached at the time the Special Agent entered the case and, if it was, that the taxpayer had a right to be warned of his constitutional rights at that time. In the words of the court:

> "The factual issues to be resolved at the hearing on the Motion to Suppress are (a) when did the investigation move from the routine civil investigatory stage to the accusatory stage where a criminal prosecution against defendant was contemplated, and (b) did the agents obtain evidence from defendant by

> deceptive and fraudulent means, specifically, by attempting to procure evidence for a criminal prosecution under the guise of conducting a routine civil examination?
>
> It would appear that the material sought by defendant from the Government would shed light on these issues and, if inspected in advance, would unquestionably expedite the hearing. If the investigation had moved to the accusatory stage where criminal prosecution was contemplated and evidence in support thereof was being prepared, then defendant should have been properly and adequately advised of his Constitutional rights. If evidence was obtained from defendant by fraud and deceit, then it should be suppressed." (Emphasis added.)

From the above, it is apparent that the Court writing in Gower approached the tax fraud investigation from the standpoint of two definitely ascertainable stages -- the routine civil investigation and the criminal "accusatory" investigation. Further, in line with the decision of the Third Circuit in Russo v. New Jersey, 351 F. 2d 429 (3rd Cir., 1965) the Gower court leaves no doubt that if the accusatory stage had been reached at the time of the fraud investigation, that the taxpayer had a right to be warned of his constitutional guarantees at that time.

A comparison of this reasoning to that of Kohatsu makes it clear that entirely different approaches have

been used. In Kohatsu the court holds that the investigation has not "focused" within the meaning of Escobedo at the time of the Special Agent's entry into the case for the reason that the inquiry at that time is still basically one of ascertaining whether a crime has been committed as opposed to narrowing down the list of suspects.

What the Ninth Circuit does not seem to recognize is the fact that in tax prosecutions there is only one prime suspect - the taxpayer; and, if the crime of tax fraud has been committed, it is almost of necessity the taxpayer who committed it. Thus, the tax investigation by its nature centers, not on who committed the crime, but rather on whether the crime has in fact been committed at all.

Consequently, to hold, as the Ninth Circuit does, that the investigation has not "focused" on the accused because proof of the crime is still the key issue, is to ignore the realities of the tax investigation. It was recognition of the very fact that a tax investigation does follow a different format than the typical criminal investigation which prompted the Gower court to observe that a warning of rights would be required at the time the Special Agent entered the case if at that time the "criminal prosecution was contemplated and evidence in support thereof was being prepared."

Since the very entry of a Special Agent into a case presupposes at least a potential criminal prosecution, it is clear that the two cases are totally at odds in their viewpoints with one (Gower) recognizing the distinct likelihood of the accusatory stage having been reached while the other (Kohatsu) holds that the accusatory stage

has definitely not been reached.

## CONCLUSION

It is submitted, in light of these newly decided cases, that this Court's order denying certiorari should be reconsidered and a writ of certiorari ordered to issue for the purpose of reviewing both the issue of appealability and the constitutional issue presented under Escobedo.

Respectfully submitted,

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For

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Pursuant to Rule 58 (2) I hereby certify that the above petition for rehearing is presented in good faith and not for purposes of delay. I further certify that the contents of said petition are confined to intervening circumstances of substantial or controlling effect, or to other substantial grounds available to petitioner although not previously presented.

JAMES O. HEWITT